Brief of City. Sec. Wm Bowen for Appellee.

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In the Supreme Court of the United States.

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DAVID BROWN, APPELLANT,
v.
CORNELIUS N. BLISS, SECRETARY OF the Interior, appellee. } No. 581.

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STATEMENT.

This is an appeal from a decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District (Justice Cox) sustaining a demurrer to and dismissing a bill for an injunction restraining Cornelius N. Bliss, as Secretary of the Interior, from disposing of certain described lands in Harney County, Oreg., as public lands of the United States.

The appellant, David Brown, claims title to these lands under the swamp-land grant to the State of Oregon.

The act of September 28, 1850 (9 Stat., 519), granted to the State of Arkansas "the whole of those swamp

and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act," and in its second section provided:

> That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof.

Section 4 enlarged the operation of the act by making it applicable to other States in which such lands were situated.

By the act of March 12, 1860 (12 Stat., 3), the provisions of the act of September 28, 1850, were, with some limitations not material to this controversy, extended to the then recently admitted States of Minnesota and Oregon.

The allegations of the bill may be summarized as follows:

1. That Henry M. Teller, as Secretary of the Interior, adjudged and determined that the lands in controversy were swamp and overflowed lands inuring to the State under the swamp-land grant, and that "*then and there, on the 16th day of September, A. D. 1882*," Mr. Teller, as such Secretary, made out an accurate list and plats of said lands, together with other lands embraced in said determination, and transmitted the same to the governor of the State of Oregon, the list being denominated as "List No. 5." (Paragraph 4 of bill, printed record, p. 2.)

2. That Mr. Teller was succeeded as Secretary of the Interior by Lucius Q. C. Lamar March 5, 1885, but up

to the time of such succession no proceeding whatever had been initiated looking to the annulment, cancellation, or suspension of said "List No. 5," or looking to the revocation, alteration, or modification of Secretary Teller's action in approving said list and adjudging and determining that the lands described therein were swamp and overflowed, within the meaning of the acts aforesaid. (Paragraphs 5 and 6 of bill, printed record, p. 2.)

3. That Mr. Lamar was succeeded as Secretary of the Interior by William F. Vilas, December 6, 1887, and that on December 27, 1888, Mr. Vilas, as such Secretary, annulled, canceled, and revoked said "List No. 5," annulled and revoked the determination of his predecessor in office, Mr. Teller, that the lands in controversy were swamp and overflowed, and himself adjudged and determined that said lands were not swamp and overflowed. (Paragraphs 9 and 10 of bill, printed record, p. 4.)

4. That thereafter divers proceedings were taken before the Secretary of the Interior and in the General Land Office by the State of Oregon, and by the grantors of the plaintiff to set aside and have held for naught the said action of Secretary Vilas, which proceedings came to an end within one year before the filing of the bill, and that the present Secretary of the Interior, Mr. Bliss, is proceeding to put in force and carry out the action of Secretary Vilas and hold the lands described in the bill to be public lands of the United States, subject to entry under the laws thereof. (Paragraphs 11 and 12 of bill, printed record, p. 4.)

5. "That upon the approval and transmission of the said 'List No. 5' by the said Henry M. Teller as such

Secretary * * * the title to said lands vested in fee in the State of Oregon and its assignees * * * so that thereafter it was not within the power of the then Secretary of the Interior or of any of his successors in office, or of any officer of the Government of the United States, effectively to revoke such approval or to revoke or annul the orders, rulings, and determinations made in that behalf by the said Henry M. Teller as such Secretary * * * or to injuriously affect the rights of the State of Oregon or of its assignees or of this plaintiff to the lands aforesaid." (Paragraph 13 of bill, printed record, p. 4.)

6. That *July 26, 1880*, one H. C. Owen purchased from the State of Oregon the lands described in the bill; that thereafter by divers mesne conveyances the title of Owen vested in the plaintiff, and April 4, 1898, the State of Oregon, in pursuance of said sale and conveyances, made, executed, and delivered to the plaintiff its patent for said lands. (Paragraphs 7 and 8 of bill, printed record, p. 3.)

The prayer of the bill is that the action of Secretary Vilas of December 27, 1888, so far as the same affects the lands in controversy, be canceled and annulled by the court and declared void and of no effect; and that Mr. Bliss, as Secretary of the Interior, and the subordinate officers of the Land Department, be restrained and enjoined from executing or carrying into effect the said action of Secretary Vilas, and from dealing with said lands as public lands of the United States, and from in any way interfering with or molesting the plaintiff in his title. (Printed record, p. 5.)

ARGUMENT.

I. *The bill makes no claim that Brown or any of his grantors purchased on the faith of Secretary Teller's listing of the lands to the State.*

That Secretary Teller's action, September 16, 1882, could not have been an inducement to Owen's purchase from the State, July 26, 1880, is obvious, and yet plaintiff claims through that purchase. After stating that Owen purchased the lands from the State July 26, 1880, the bill proceeds (paragraph 8, printed record, p. 3):

> That thereafter, by diverse mesne conveyances, the title of the said H. C. Owen to the lands aforesaid vested in this plaintiff, and on the 4th day of April, A. D. 1898, the State of Oregon, in pursuance of said sale and conveyances, made, executed, and delivered to this plaintiff its patent, in due form of law, under the seal of said State, for the lands aforesaid.

The date of the patent from the State to plaintiff is thus given as April 4, 1898, but when the mesne conveyances were made by which Owen's title vested in plaintiff is not stated. In a subsequent portion of the bill there is a pretty strong intimation that the plaintiff's purchase was subsequent to Secretary Vilas's cancellation of "List No. 5." Paragraph 10 (printed record, p. 4) recites the action of Mr. Vilas as Secretary, and then paragraph 11 proceeds:

> That *thereafter*, as plaintiff is informed and believes, divers proceedings were taken before the said Secretary of the Interior and in the General Land Office of the United States *by the State of Oregon and by the grantors of this plaintiff* to set aside and have held for naught the orders and rulings so made by the said William F. Vilas as such Secretary of the Interior, which proceedings came to an end within one year last past.

The bill thus alleges that the proceedings to obtain a setting aside of Secretary Vilas's action were had on application made "by the State of Oregon and by the grantors of this plaintiff," and thereby impliedly states that the plaintiff's grantors and not the plaintiff were at that time the parties in interest. Aside from this, the bill fixes only two points of time in connection with the purchases and conveyances therein mentioned; one is that Owen purchased from the State July 26, 1880, two years before Secretary Teller's action, and the other that the State patented the lands directly to the plaintiff April 4, 1898, almost ten years after Secretary Vilas's action.

Sometime between Owen's purchase and the State's patent to plaintiff the lands were transferred by "divers mesne conveyances" from Owen to the plaintiff, but whether these mesne conveyances were made before or after Secretary Teller's action in listing the lands to the State, and whether they were made before or after Secretary Vilas's action in canceling the list are matters upon which the bill is entirely silent; nor does it even formally allege that plaintiff or any of his grantors purchased in reliance upon the listing by Secretary Teller.

II. *If these lands had been purchased on the faith of the listing thereof by Secretary Teller, the lands being unpatented at the time, the purchaser would only have acquired an equity which he would have held subject to examination, as shown by Michigan Land and Lumber Co.* **v.** *Rust, infra.*

In the absence of a statute to that effect there could not in law be a *bona fide* purchase of these lands as against the Government while it retains the legal title.

Generally, under the public land laws, an entry of public lands accompanied by the giving of a patent certificate passes the equitable title, but the legal title remains in the United States until the issuance of patent. One who purchases an equitable title obtains no higher or better right than that possessed by his grantor.

In *Root* v. *Shields* (1 Woolworth's Circuit Court Reports, 340, 363; 20 Fed. cases, 1160, 1167), Mr. Justice Miller considered and passed upon the rights acquired by purchase after entry and patent certificate but before issuance of patent. Justice Miller there said:

> It is further insisted on behalf of the defendants that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons.
>
> They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the Land Office. But that is a circumstance not material to this consideration. Until the issue of the patent the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary.

In *Craig* v. *Leiper* (24 American Decisions, 479, 482), the court said, in speaking of a similar question:

> But suppose the purchaser knows the vendor is not seized in fee, that he claims only an equity, the legal estate outstanding, and with full knowledge deals for the equity; in such case no one will pretend that the vendee can rely upon the plea that he is an innocent purchaser without notice; the main requisite is wanting—that he believed the vendor seized in fee.
>
> In case of land claimed by entry in this country, every person dealing therefor is presumed to know the fact whether it has or has not been granted by the State, because this is a matter of record which ordinary diligence can ascertain and which all interested are bound to know, if material, before they contract. All the defendants, then, to this cause are presumed to have known that they were dealing for an entry only.

In *Stout* v. *Hyatt* (12 Kans., 232, 243), in passing upon a similar claim of *bona fide* purchase, the court said:

> It is claimed that the plaintiff Hyatt is a *bona fide* purchaser of said land, without any notice of a want of payment therefor, and that therefore said receipt can not be disputed. Now, it may be that the plaintiff is a *bona fide* purchaser in fact, as he claims; but we hardly think that such can be so in law. At the time the plaintiff purchased said land, no patent for the same had yet been issued. The legal title to the land was therefore still in the territory of Kansas, and was not in Hughes, the plaintiff's grantor. The plaintiff could therefore at most obtain only an equitable title from his grantor. And a party purchasing a merely equitable title must always take notice of all counter equities which may be outstanding in favor of the person holding the legal title. A party purchasing a merely equitable title can not be a *bona fide* purchaser so as to defeat prior equities existing in favor of the person holding the legal title.

In *Taylor* v. *Weston* (77 Cal., 534, 540), the court held:

> In the case before us the person through whom the respondent claims had only a contract of purchase. It is undisputed that the legal title is in the State, the very object of the proceeding being to determine who is entitled to a conveyance from the State. What is called a certificate of purchase (although treated as evidence of title as between third parties) is, as against the State, merely evidence of a contract to convey. And the respondent must establish his right against the State, each party in this kind of proceeding being an actor. (*Dillon* v. *Saloude*, 68 Cal., 269.) Hence, the rule as to the purchase of equitable interests applies. And it has been applied by courts of authority to cases in relation to the acquisition of public lands. In *Root* v. *Shields*, 1 Woolw., 364, it was applied by Mr. Justice Miller to the assignee of a preemption claim. In *Craig* v. *Leiper*, 2 Yerg., 193, 24 Am. Dec., 479, it was applied in an able opinion by Catron, J., to the grantee of the rights acquired by an entry and land warrant under the early land laws. In *Stout* v. *Hyatt*, 13 Kan., 243, 244, it was applied to the assignee of a preemption claim for school lands under the territorial laws of Kansas. And in *Maghee* v. *Robinson*, 98 Ill., 466, it was applied to the assignee of a swamp-land certificate of purchase. (See also Chrisinger's Case, 4 Decisions of Department of Interior, 347.) We think, therefore, that the court below erred in holding the defendant Payne to be protected by the rule as to *bona fide* purchasers.
>
> It is hardly necessary to add that in what we have said we have no reference to cases where the legal title has passed to the person through whom the *bona fide* purchaser claims.

In *United States* v. *Johnson et al.* (5 L. D., 442, 443) Acting Secretary Muldrow said:

> It is further insisted by the appellant Corrigan that he is an innocent purchaser without notice,

and therefore the cancellation of said entries could not affect his rights. But this contention can not be maintained. All purchasers of lands after entry and prior to the issuance of patents are charged with notice that said entries must be confirmed by your office, and if the entryman has imposed upon the register and receiver with false and fraudulent proof and thereby obtained a certificate of entry, the purchaser can acquire no better title than the vendor possessed.

In *Smith* v. *Custer et al.* (8 L. D., 269, 278) Secretary Vilas held:

> Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the further action of the department and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and department upon which a patent may issue. He is not an "innocent purchaser," so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the department. He buys a title *sub judice*. At the most, it is but an equitable title, the legal title being in the Government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of his vendor, and has no better standing than he. (*Boones* v. *Chiles*, 10 Peters, 177; *Root* v. *Shields*, 1 Woolworth, 340.)

In *Traveler's Insurance Co.* (9 L. D., 316, 320) First Assistant Secretary Chandler said:

> None of these cases conflict with the doctrine that a duplicate receipt is equivalent to a patent when rightfully and lawfully obtained, and no decision of a supreme court of any State or the United States, that I am able to find, goes so far as to hold the Government may not protect itself against fraud in the entry at any time before patent issues. Such is the universal holding of such courts.
>
> Upon the second proposition contended for by counsel, the rule of the law is that there can be no such thing as a *bona fide* purchase of Government lands prior to the issuing of patent. That one who deals with such lands under such circumstances takes only the equity of the claimant, charged with notice of the law and the supervisory control of the Commissioner of the General Land Office over the rulings and decisions of the register and receiver, acts at his peril in his purchase, has applied to him the rule of *caveat emptor* in all its rigor, as it affects the rights of the entryman with reference to qualifications, and compliance with the preemption law as to residence and cultivation—standing, so to speak, in his shoes, having no greater rights or equities than the entryman from whom he purchased.

In *United States* v. *Allard et al.* (14 L. D., 392, 403), Secretary Noble held:

> Many cases have arisen before this Department and in the courts, under the general land laws, involving the rights of purchasers before patent, without notice of defects in the title, subsequently found to have existed at the time of the purchase. In such cases, as a general rule, it has been held, in effect, (1) that the action of the local officers in accepting proof and payment, and issuing duplicate receiver's receipt, is not a final adjudication in favor

of the entryman, and does not preclude the Land Department from subsequently inquiring into the good faith of the transaction, and canceling the entry, if found to have been obtained through fraud, or that the entryman has failed in any particular to comply with the requirements of the law; (2) that, even when an entry is made in good faith, and the law in all respects has been complied with, the entryman, by his receiver's duplicate receipt, takes only an equity, the legal title to the land remaining in the Government until patent issues; and (3) that a purchaser prior to patent takes only the equity of the entryman, is charged with notice of the law and the supervisory control of the Land Department over the action of the local officers, and stands in no better position than the entryman himself. A long line of decisions support these propositions as applied to the public land laws as a whole, and in the later cases they have been adhered to with marked uniformity.

III. *It is significant that the bill contains no allegation and makes no claim that these lands were in fact swamp and overflowed in character.*

The grant to the State of Oregon is limited to "swamp and overflowed lands made unfit thereby for cultivation." Lands which are not of that character do not pass under this grant. The listing to the State of lands which are not swamp and overflowed is in violation of law, and the issuance of a patent upon such list would be a perpetuation of the unauthorized and unlawful act.

IV. *The appellant is not entitled to any relief upon the allegations of his bill if, by any proceeding in the Land Department, Secretary Vilas could have lawfully canceled and revoked the listing of these lands to the State of Oregon.*

In this connection the allegations of the bill are: (1) that Secretary Teller determined that the lands were

swamp and overflowed, inuring to the State under the swamp-land grant, and listed them to the State as such; (2) that when he retired from office no proceeding whatever had been initiated looking to the revocation of said determination or the cancellation of said list; and (3) that Secretary Vilas subsequently revoked Secretary Teller's determination as to the character of the lands and canceled the listing thereof to the State.

The bill does not state which of these apparently conflicting determinations accords with the true character and condition of the lands at the date of the grant; nor does it state what evidence or showing induced the determination and action of either Secretary. It mentions Mr. Lamar's incumbency of the office of Secretary of the Interior between the respective terms of Mr. Teller and Mr. Vilas, but does not state whether any proceeding affecting the title to these lands was initiated or had while Mr. Lamar was such Secretary. There is no allegation that Secretary Vilas's determination and action were arbitrary or without notice to the State and its grantees or were without a full and fair hearing.

Consistently with every allegation in the bill, a full and fair hearing with full notice to the State and its grantees may have been had under the direction of Secretary Lamar or Secretary Vilas, wherein it was indisputably shown and ascertained that the determination and action of Secretary Teller were the result of an obvious and serious mistake or inadvertence, or were induced by a report of a subordinate in the Land Department charged with the duty of ascertaining and reporting the true character and condition of the lands at the date of the grant, but who, for the purpose of assisting

the State's grantee in obtaining the Government title, falsely, fraudulently, and corruptly represented to Mr. Teller, as such Secretary, that said lands were swamp and overflowed within the meaning of the granting acts, when in truth and in fact they were not of that character or in that condition.

The law uniformly indulges a presumption of correct official conduct and action until the contrary is shown, and, therefore, if by any proceeding in the Land Department it would have been competent for Secretary Vilas, to vacate the listing of said lands to the State and to determine their true character and condition, it will be presumed that an appropriate proceeding was regularly had, and that the facts then ascertained justified his action, there being no showing to the contrary.

V. Under the acts making the swamp-land grant to Oregon the legal title remains in the United States until the issuance of patent to the State, and until then the grant is in process of administration and the land is subject to the jurisdiction of the Land Department, of which the Secretary of the Interior is the head. The lands in controversy not being patented, Secretary Vilas' action was fully within the scope of his authority. The duties and authority of the Secretary of the Interior are impersonal and not dependent upon who happens to be filling the office for the time being. The fact that the Secretary who made the list is not the one who revoked it is not material.

The question as to when the jurisdiction and authority of the Land Department, of which the Secretary of Interior is the head, over proceedings for the acquisition of public lands ceases and terminates, has been the subject of both judicial and departmental investiga-

tion. The case of *Michigan Land and Lumber Co.* v. *Rust* (168 U. S., 589, 591, 592) involved the authority of the Land Department over the identification of the particular lands passing under the swamp-land act of September 28, 1850, *supra*, and the finality of the action of the Secretary of the Interior in approving and certifying to the governor of the State a list of such lands. All the lands in a certain district in the State of Michigan which were believed to be swamp and overflowed in character were listed to the State by the Secretary of the Interior October 27, 1853, and the list was transmitted to the governor of the State January 13, 1854.

It being ascertained that the information (an official survey) upon which the first listing was based was inaccurate and erroneous, the Secretary of the Interior, May 18, 1866, made a second list, embracing all the lands ascertained by him to be swamp and overflowed in that district, and the same was transmitted to the governor of the State May 26, 1866. The land in controversy in that case was embraced in the first list, but not in the second one, which it was claimed had superseded the first. While the fact that there had been a change of Secretaries between the making of the two lists is not specially mentioned in the decision, it is shown by the printed record in that case, at pages 39 and 179, that the first list was made by Secretary McClelland and the second by Secretary Harlan, so that the effect of a change in Secretaries was fully presented by the case. The court said:

> The act of 1850 made a grant *in præsenti:* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification. (*Railroad Company* v. *Smith*, 9 Wall., 95;

French v. *Fyan*, 93 U. S., 169; *Martin* v. *Marks*, 97 U. S., 345; *Rice* v. *Sioux City and St. Paul Railroad*, 110 U. S., 695; *Wright* v. *Roseberry*, 121 U. S., 488; *Tubbs* v. *Wilhoit*, 138 U. S., 134.) But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. Section 2 contains this provision:

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in said State of Arkansas, subject to the disposal of the legislature thereof."

* * * * *

It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Works* v. *American Emigrant Co.* (164 U. S., 559, 574) it was said, speaking in reference to this matter, and after a full review of the previous authorities: "When he" (that is, the Secretary of the Interior) "made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued."

Generally speaking, while the legal title remains in the United States, the grant is in process of administration, and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. (*Strother* v. *Lucas*, 12 Pet., 410, 454; *Grignon's Lessee* v. *Astor*, 2 How.,

319; *Chouteau* v. *Eckhart*, 2 How., 344, 372; *Glasgow* v. *Hortiz*, 1 Black, 595; *Langdeau* v. *Hanes*, 21 Wall., 521; *Ryan* v. *Carter*, 93 U. S., 78.) Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat., sec. 2449; *Frasher* v. *O'Connor*, 115 U. S., 102); but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent (*Bagnell* v. *Broderick*, 13 Pet., 436, 450); and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

It is, of course, not pretended that when an equitable title has passed, the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. (*Cornelius* v. *Kessel*, 128 U. S., 456; *Orchard* v. *Alexander*, 157 U. S., 372, 383; *Parsons* v. *Venzke*, 164 U. S., 89.) In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. * * * After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. * * *

In *Moore* v. *Robbins* (96 U. S., 530), it was said:

While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public lands, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent had been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land

> office. * * * With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed.

In *United States* v. *Schurz* (102 U. S., 378, 395, 402), it was said:

> The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.
>
> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.
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> * * * * *
>
> From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.
>
> It is equally clear that this period is, at the latest, precisely when the last act in the series

essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away.

This case (p. 401) also speaks of a decision as final when it is "made and recorded in the shape of the patent."

In *Smelting Co.* v. *Kemp* (104 U. S., 636, 640) the court said:

> The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after cer-

> tain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with.

In *New Orleans* v. *Paine* (147 U. S., 261, 266), in ruling upon the finality of decisions of the Land Department, the court says:

> Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.

This language was quoted with approval in *Michigan Land and Lumber Company* v. *Rust*, *supra*, at page 594.

In *Beley* v. *Napthaly* (169 U. S., 353, 364), it is said:

> The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office.

Then, referring to *United States* v. *Stone* (2 Wall., 525) and *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165), two of the cases relied upon here by appellant, the court said:

> The case of *United States* v. *Stone* (2 Wall., 525) has no bearing adverse to this proposition. In that

case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially; that if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the Land Office is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does *Noble* v. *Union River Logging Railroad* (147 U. S., 165) touch the case. The principle therein decided was in substance the same as in the Stone Case, *supra*. The control of the department necessarily ceased the moment the title passed from the Government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map, as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted.

The following provisions in the Revised Statutes of the United States have reference to the authority of the Secretary of the Interior over proceedings for the disposition of public lands:

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *

Second. The public lands, including mines.

* * * * *

SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all agents [grants] of land under the authority of the Government.

SEC. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [public lands] not otherwise specially provided for.

In *Knight* v. *United States Land Association* (142 U. S., 161, 177, 178, 181), in construing these statutory provisions and in discussing the jurisdiction and power of the Secretary of the Interior over proceedings for the disposition of public lands, the court said:

> The phrase, "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claim-

ants and preserve the rights of the people of the United States.

* * * * *

The statutes, in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the Department having for their ultimate object * * * the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised, in the absence of statutory direction, may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul.

* * * * *

The Secretary is the guardian of the people of the United States over the public lands. The obli-

> gations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the survey and disposal of the public lands.

In *Williams* v. *United States* (138 U. S., 514, 524), it is said:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

The case of *Warner Valley Stock Co.* v. *Smith* (9 App. D. C., 187), is essentially the same as the case at bar, excepting that there the Secretary who listed the lands to the State revoked his own listing, while in the case at bar the listing was revoked by a succeeding Secretary. It was held in that case that under the acts of September 28, 1850, and March 12, 1860, the fee-simple title does not vest in the State until the issuance of patent, and that where patent has not issued it is competent for a Secretary of the Interior to revoke his listing of lands to the State, with a view to redetermining their character.

The principles announced in these decisions of the Supreme Court are applied by the Secretaries of the Interior in the administration of the public land laws.

In this connection it is important to note the difference between the swamp-land acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519).

The earlier act contained no provision for the issuance of patents, but, after directing that the lands should be designated in lists to be approved by the Secretary of the Treasury (afterwards Secretary of the Interior), contained the following declaration respecting the final passing of title: "And *on that approval* the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof."

The later act, which controls the case at bar, is not silent respecting the issuance of patent, but, after directing the listing of the lands by the Secretary of the Interior and the issuance of patent therefor at the request of the governor, contains the following declaration: "And *on that patent* the fee simple to said lands shall vest in the said State, * * * subject to the disposal of the legislature thereof." As early as December 23, 1851, Secretary Stuart, in considering these two acts, said (1 Lester Land Laws, 549):

> I have carefully reviewed my affirmance of your decision in regard to the proper construction of the acts of 2d March, 1849 (No. 166), and 28th September, 1850 (No. 182). * * * The first question involved in this case is as to the period when the grants take effect; whether it be the date of the law or the date of the approval of the selections by the Secretary; and the general law of 1850 enacts that the fee shall vest in the State, upon the issuing of a patent.
>
> In each case the granting clause is in the first section, and the words employed, viz, "are hereby granted," seem to me to import a grant *in præsenti*. They confer the right to the land, *though other proceedings were necessary to perfect the title. When the selections are made and approved, or the patent issued, the title therefore becomes perfect, and has relation back to the date of the grant.*

It is manifest from what was said that the Secretary meant that upon approval of the lists under the act of 1849, or upon the issuance of patent under the act of 1850, as the case might be, "the title therefore becomes perfect, and has relation back to the date of the grant."

Secretary McClelland held, January 14, 1856 (1 Lester Land Laws, 554), that—

> the approval of the list directed to be prepared *under act of 1849* exhausts the power of the Secretary of the Interior over the subject matter, and he can no more, of his own motion, revoke or cancel any part of an approved list *under that act* after it has passed from him than a patent for land.

Secretary Thompson, *referring to the act of 1850*, held, December 27, 1857 (1 Lester Land Laws, 557), that "The State authorities have a right to call for a patent or patents pursuant to certified lists, *unless fraud or mistake has been discovered.*" Secretary Thompson also made the following decision, June 25, 1859 (1 Lester Land Laws, 569):

> The list which accompanied your report of the 17th instant is herewith returned. It appears that the lands therein described pending an investigation of the fact of their being swampy or otherwise, under instructions of your office of April, 1858, were inadvertently included in lists which have been reported to me for approval and approved. The investigation having been completed and reported to your office, you now find that the tracts were in fact dry on the 28th September, 1850.
>
> Under these circumstances the proper course to pursue, I think, will be to omit these lands from the patents to be issued on confirmed [approved] swamp lists Nos. 3 and 4, in the Little Rock district, and to inform the governor of the State fully in respect to the mistake made, advising him that the

lands will be listed as falling under the grant for railroad purposes unless he should present paramount objections to that course.

In the case of *State of Oregon* (5 Land Decisions, 31, 34), in discussing his authority over a list of swamp lands certified to the State by his predecessor in office, Secretary Teller, and known as "List No. 5," Secretary Lamar said:

> Such approval and certification, however, will not conclude the Government if it be shown that it was obtained by fraud or mistake. If after such approval and certification of the list it is discovered that lands have been reported as swamp and overflowed, which in fact were not of that character, and that such lands were so reported through the false and fraudulent acts and misrepresentations of either the Government agent or others charged with the investigation of the character of such lands, and upon whose decision and report the approval and certification was obtained, such approval and certification may, upon proof of such facts, be reviewed and recalled. "Fraud vitiates the most important judicial acts when found to exist in them, and renders them void upon discovery before the proper tribunal." (*De Louis* v. *Meek*, 50 Am. Dec., 512, and notes to decision.)
>
> So, in like manner, a final decision of the Secretary may be reviewed and revoked, upon the ground of mistake; not mere error of judgment, but that character of mistake which would afford a ground of relief in a court of equity. *The courts have no jurisdiction over public lands until after the issuance of patent. Hence, before the issuance of patent, the Department of the Interior is the only tribunal having jurisdiction to review the decision of a former Secretary, or to revoke or recall its own decision, when obtained by fraud or mistake.*

In the case of *State of Oregon* (5 L. D., 374) Secretary Lamar further applied the rule announced in the decision last quoted from by citing the State of Oregon to show cause why said "List No. 5" should not be revoked and canceled on account of fraud practiced in procuring the approval thereof.

In the case of *State of Michigan* (7 L. D., 514, 523), Secretary Vilas said:

> When, however, the certification made by the Secretary is, before patenting, challenged for fraud or mistake, I think the right and duty remain with him to correct the identification according to the facts, so that the patent shall issue only for lands which were, in truth, granted by the act of Congress. To put the case strongly, is it to be presumed that any court would, by mandamus, compel the Secretary to issue the patent, when by false and fraudulent evidence he has been deceived into affixing his signature to a certification which embraced, among the tracts described, a large body of land beyond all dispute high and dry, in no part wet, swamp or overflowed, or unfit for cultivation? Or would a writ go to compel the patenting of such lands which, through accident or gross mistake, had been so included in a certified list?
>
> To suppose such a judgment possible would impute to a court the violation not only of the act of Congress, but of plain and acknowledged principles of justice. It necessarily follows that when such a case occurs the Secretary retains the power, until a patent issues, to correct his error in the attempt to identify the granted lands, by conforming his certification to the truth as discovered after it was made. It equally follows that when the Secretary has, before patent, made discovery of fraud, accident, or mistake, in consequence of which he has included in his certification lands not granted by the act of Congress, and has corrected the cer-

tification so as truly and rightly to identify the lands actually granted, the only right to a patent existing in the State, or which any court could enforce, attaches to the land actually granted and correctly identified by the amended certification. Otherwise the singular consequence would attach to the performance of this act, which is nowhere else suffered by the law, that fraud, mistake, or accident becomes, openly and undeniably, the basis of title, and the Government is defrauded of its lands by means which would be a sufficient foundation to relieve another grantor from a conveyance actually made. This reasoning seems, to my mind, indisputably to demonstrate that a right of correction, in a proper case, remains in the Secretary, even after a certification has been made, if the issuance of patent has not dispossessed him of jurisdiction.

In the case of *State of Oregon* (7 L. D., 572, 576) Secretary Vilas, in speaking of the same "List No. 5," mentioned in Secretary Lamar's decisions, *supra*, said:

Had these facts been known to Secretary Teller his certification of List No. 5 would never have been made. It was the product of a false report by an agent of the Government whom he was obliged to trust. The magnitude of the falsehood of that report is sufficient to show that it was fraudulent. It is impossible that an officer could have returned, in the discharge of his duty, as swamp and overflowed more than one-third of the lands so reported which were in fact dry, and so great a proportion of which were upon mountains or arid deserts. He was guilty of fraud if he made this return recklessly, without knowledge of the facts; but in view of his relations to the largest claimant of the lands, as to some extent disclosed by the contract shown, his action can not but be regarded more unfavorably. The Government

ought not to be, and can not be, bound by the act of certification brought about by such means. It must be revoked and canceled, as would very promptly have been done by the Secretary who signed it if the facts had been disclosed to him while in office.

Some question has been raised of my jurisdiction to make this order. This question has been repeatedly considered by my predecessors in office, and but one conclusion was ever reached. In the case of the State of Michigan, recently decided, I have expressed to some extent the reasons which seem to me to support the jurisdiction of the Department to correct such an error. To that decision I need add nothing for the purposes of this case. Suffice it to say, that unless the certification may be revoked, it would appear necessary to follow it by patent, and thus invest the State with the possession of a grant which ought immediately to be set aside by a court of equity. If such be the law, the State and her grantees are not without remedy, and my assumption of jurisdiction can be reviewed and corrected by the courts. It ought to require nothing less than a mandate from the court of last resort to compel the head of this Department, charged with the duty of caring for the interests of the Government and truly identifying the lands it has granted, to become an instrument for so great an outrage upon its grant as the facts here disclosed show a patent would be.

In State of Minnesota (6 L. D., 37) Acting Secretary Muldrow, in discussing the effect of a certification to the State of two lists of swamp lands which were alleged to have been based upon erroneous and fraudulent information, said:

The Secretary of the Interior has jurisdiction to review the decision of a former Secretary, or to revoke or recall his own decision when obtained by fraud or mistake, and if the record discloses such

facts, the Department will take jurisdiction, irrespective of the authority or jurisdiction of the Commissioner.

In the case of the State of Oregon (5 L. D., 31), involving this same question, the Department held that the approval and certification of the Secretary of swamp and overflowed lands determined affirmatively their swampy character, and such certification can not be revoked or canceled, unless it be shown that it was obtained by fraud or mistake. This decision followed the uniform ruling of the Department as to the finality of the decision of the Secretary upon such issues.

In State of Florida (12 L. D., 565), Acting Secretary Chandler, in passing upon a list of swamp lands theretofore certified to the State of Florida, said:

> From the foregoing statement of facts, it is apparent that the certification of these lands was made upon a misapprehension of the facts, and that said list would not have been certified and approved, if the facts, as shown by the records of your office, had been presented to the Secretary.
>
> Having jurisdiction over such lands until after the issuance of patent, I deem it my duty, under the facts above set forth, to revoke and cancel said certification and approval, as to the lands above mentioned.

These departmental decisions were also followed by Secretary Bliss in State of Florida (26 L. D., 117), involving Swamp-Land List No. 87, theretofore certified to the State.

The authority of one Secretary of the Interior to review or reconsider the action of a preceding Secretary is believed to be correctly stated by Secretary Bliss in *Parcher* v. *Gillen* (26 L. D., 34, 42), as follows:

> THE TRUE RULE DRAWN FROM AN EXAMINATION OF ALL OF THE AUTHORITIES IS THAT THE

JURISDICTION OF THE LAND DEPARTMENT CEASES WHERE THE JURISDICTION OF THE COURTS COMMENCES, VIZ, WHEN THE LEGAL TITLE PASSES, AND THAT THERE IS NO HIATUS BETWEEN THE TERMINATION OF THE ONE AND THE BEGINNING OF THE OTHER. UNDER THIS RULE THE LAND WILL ALWAYS BE WITHIN A JURISDICTION WHICH CAN ADMINISTER THE LAW AND PROTECT BOTH PUBLIC AND PRIVATE RIGHTS.

THE OFFICE OF THE SECRETARY OF THE INTERIOR IS A CONTINUING ONE. ITS INCUMBENTS COME AND GO, BUT THE OFFICE REMAINS. THE POWERS AND DUTIES OF THE OFFICE ARE IMPERSONAL, AND OPERATE UNIFORMLY AT ALL TIMES AND UPON ALL CONTROVERSIES WITHOUT REFERENCE TO WHO MAY BE EXERCISING THOSE POWERS OR PERFORMING THOSE DUTIES. A CHANGE IN THE PERSON HOLDING THE OFFICE DOES NOT AUTHORIZE, AND SHOULD NOT INVITE, A REVIEW OR REVERSAL OF PRIOR RULINGS OR DECISIONS; AND NEITHER DOES SUCH CHANGE PREVENT OR DEFEAT A REVIEW OR REVERSAL IN ANY INSTANCE WHERE THE SECRETARY MAKING THE RULING OR RENDERING THE DECISION, IF STILL IN OFFICE, WOULD BE IN DUTY BOUND TO REVIEW AND REVERSE HIS OWN ACT. ADMINISTRATIVE REASONS, AS WELL AS THE PRINCIPLES OF COMMON JUSTICE, REQUIRE THAT A SECRETARY SHOULD NOT DISTURB OR REVERSE PRIOR RULINGS OR DECISIONS EXCEPT WHERE IT IS AFFIRMATIVELY SHOWN THAT MANIFEST INJUSTICE HAS BEEN DONE OR THE LAW CLEARLY MISAPPLIED; BUT THIS IS EQUALLY TRUE OF HIS OWN RULINGS AND DECISIONS, AND IS NOT LIMITED TO THOSE OF HIS PREDECESSORS.

SO LONG AS THE LEGAL TITLE REMAINS IN THE GOVERNMENT THE SECRETARY OF THE INTERIOR, WHOEVER HE MAY BE, IS CHARGED WITH THE DUTY OF SEEING THAT THE LAND IS DISPOSED OF ONLY ACCORDING TO LAW. THE ISSUANCE OF A

PATENT IS THE FINAL ACT AND DECISION IN THAT DISPOSITION, AND WITH IT AND NOT BEFORE DOES THE SUPERVISORY POWER AND DUTY OF THE SECRETARY CEASE.

VI. *The case of Michigan Land and Lumber Co. v. Rust, supra, authoritatively determines that the listing of swamp lands is not the final act of identification and does not terminate the authority or jurisdiction of the Land Department, and that the identification is not finally accomplished and the authority or jurisdiction of the Land Department is not terminated until the issuance of patent.*

The extent to which this question had been presented to and considered by the court at the time of that decision is worthy of recitation in determining the effect to be given to that decision. The case of *Warner Valley Stock Co.* v. *Smith* (165 U. S., 28), involving the authority of the Secretary of the Interior to revoke and cancel a listing of lands to the State of Oregon under the swamp-land grant had been recently argued at length, both orally and in printed briefs, the arguments and citations of authority covering everything presented in the case at bar. By reason of the retirement from office of Secretary Smith the proceeding abated, and therefore no decision upon the question here presented was made in that case. In *Michigan Land & Lumber Co.* v. *Rust, supra*, coming before the court shortly thereafter the parties presented *in extenso*, both orally and in printed briefs, the same arguments and citations of authority which had been presented in *Warner Valley Stock Co.* v. *Smith*, and which are now presented in the case at bar. In the light of this repeated presentation of the question and the reference in the opinion in *Michigan Land and Lumber Co.* v. *Rust* to the identical

decisions relied upon by the appellant here, it can not be said that the decision in that case is not entitled to the respect and authoritative effect accorded to the most solemn and deliberate declarations of this court.

VI. *The facts of this case do not bring it within the limits within which the courts issue process directly against high officers of the executive branch of the Government.*

The general principle governing the issuance of injunctions against heads of Executive Departments was laid down by Mr. Justice Miller in *Gaines* v. *Thompson* (7 Wall., 347, 352–354) as follows, after discussing the earlier authorities in *mandamus* cases and showing that that writ can issue only to compel the performance of a ministerial duty:

> It may, however, be suggested that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as those principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to

the writ of injunction as it is to the writ of mandamus.

In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

Accordingly, in the case of *The State of Mississippi* v. *Johnson*, which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

In the same case the Chief-Justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: "A ministerial duty, the performance of which may in proper cases be required of a head of a Department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

* * * * * *

The numerous cases referred to by counsel, in which this court—after the title had passed from the United States, and the matter had ceased to be under the control of the Executive Department—has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the Department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control.

In *French* v. *Fyan* (93 U. S., 169, 173), the controversy arose under the swamp land act of 1850. The Secretary of the Interior neglected or refused to do his duty in the premises, and it appeared that he had made no lists and "would issue no patents." The question thus arose whether he could be forced to do his duty in the premises as an inferior judicial tribunal may be forced to take up and decide some lawsuit which it has neglected. The court, speaking by Mr. Justice Miller, held that he could not be forced to do so; and for this reason justified a former decision in *Railroad Co.* v. *Smith* (9 Wall., 95), allowing litigants to prove title to swamp land by parol evidence when the Secretary unreasonably refused to act. The learned justice said:

> There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty. (*Gaines* v. *Thompson*, 7 Wall., 347; *Secretary* v. *McGarrahan*, 9 id., 298; *Litchfield* v. *The Register and Receiver*, id., 575.)

These remarks have been quoted with approval in *McCormick* v. *Hayes* (159 U. S., 332, 342).

When the doing of an act involves sufficient executive discretion to bar a writ of mandamus, it involves sufficient executive discretion to bar an injunction. This seems clearly to follow from the principle laid down in *Gaines* v. *Thompson*, supra, and is exemplified by other decisions of this court. The remedies are correlative.

A decision in favor of the swamp-land claimant would involve a question of documentary construction arising

upon various statutes and departmental records, and this is sufficient to invest it with the quality of executive discretion and bar direct interference of the courts.

The case of *Litchfield* v. *Register and Receiver* (9 Wall., 575) is directly in point. That case arose under the Des Moines River Improvement grant of 1846, and subsequent legislation *in pari materia*. Mr. Litchfield, the complainant, claimed under the grant. The legislation is set forth in many opinions of this court, among which we may refer to *Bullard* v. *Des Moines R. R.* (122 U. S., 167). Congress having granted alternative sections along the Des Moines River to the territory of Iowa in 1846 (p. 169), certain certifications were made by one of the Secretaries of the Treasury which, in a case to which Mr. Litchfield was a party, were held to be illegal (pp. 170–71). Congress thereafter, in 1862, granted to that State the whole of the territory in controversy, the title inuring to the benefit of *bona fide* purchasers from the State (pp. 171–2).

Mr. Litchfield, after this legislation, filed a bill in equity in the circuit court for the district of Iowa against the register and receiver of the land office at Fort Dodge, in that State, "asking an injunction to restrain them from entertaining and acting upon applications made to them to prove preemptions to certain lands which lay within the land district for which they were, respectively, register and receiver." (9 Wall., 576.) The bill set forth very fully the acts of Congress and of the State of Iowa, by which complainant maintained that the land in question through this grant had become his property. The grant has frequently been held to have been one *in præsenti*. (*United States* v. *Des Moines Navigation and Railway Company*, 142 U. S., 510.)

Mr. Litchfield thus sets forth a case very similar to that which is made by the present bill, if appellant's position upon the merits is correct: namely, a series of statutes and executive documents which showed him to be the legal owner of the premises through grants by the United States. His claim was the same: namely, that the bill "showed that the land officers were exceeding their authority and would give certificates of preemption and entry which would cloud and embarrass his title and that they should therefore be restrained" (p. 576). Nevertheless, the bill was dismissed on demurrer for want of equitable jurisdiction. The opinion is by Mr. Justice Miller, and is fatal to the present bill. We incorporate the opinion in full so far as relevant to the question now under consideration (pp. 577–578):

> The principle has been so repeatedly decided in this court that the judiciary can not interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of *Gaines* v. *Thompson*, decided at the last term of this court, the whole subject was fully considered and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of *The Secretary* v. *McGarrahan*, of the present term, reaffirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the Land Department.
>
> It is insisted, however, by the complainant, that the present case does not come within the rule so

laid down, and his argument is plausible. A little consideration, however, will show that it is unsound.

The lands in controversy are situated within the land district over which these officers have authority to receive proof of preemption and grant certificate of entry. There are within that district, of course, lands open to sale and preemption. There would be no use for the land office if there were not. The very first duty which the register is called upon to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper Department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the Departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the Land Department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they gave patents to the applicants for preemption, the courts can then

> in the appropriate proceeding determine who has the better title or right. To interfere now is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court.

The Litchfield Case thus applies to injunction suits the same rule which has already been thoroughly settled by decisions of this court upon mandamus proceedings, namely, that judicial process will not issue against officers of the coordinate executive branch of the Government when the point at issue involves the construction of ambiguous statutes or documents.

This ruling was first established in the well-known case of *Decatur* v. *Paulding* (14 Pet., 497), upon full discussion. Two justices dissented upon this point, but there has never been any dissent in the decisions which have followed it. The rule doubtless gives a narrower scope to the remedies of mandamus and injunction against executive officers than exists in some of the States, where these summary remedies are a favorite method for obtaining the settlement of difficult statutory problems. The limit to Federal jurisdiction in this matter is doubtless due to the very great contest made in *Kendall* v. *United States* (5 Cranch C. C., 163; 12 Pet., 524) against the power of Federal courts to issue writs enforceable only by contempt proceedings against high officers of a coordinate branch of the Government.

The protest of Postmaster-General Kendall and opinion of Attorney-General Butler upon this point will be found at 5 Cranch C. C., pp. 192–199, 221–225. While the dissenting justices in the Kendall case united with their brethren in overruling the Constitutional point (12 Pet., p. 626), nevertheless, doubtless prompted by considerations of comity, and out of respect to the preva-

lent theory of the mutual independence of the three branches of the Government, the court restricted their jurisdiction to narrow limits (pp. 611, 613, 614, 624).

The Decatur case came up two years later before the same nine justices; and it is noticeable that Chief Justice Taney, who filed an individual opinion in the first case, and spoke for a majority of the court in the second, had been the head of the Treasury Department as well as Attorney-General, while Mr. Justice Thompson, who spoke for the majority of the court in the first case, had been Secretary of the Navy, and Mr. Justice McLean, who filed an opinion in the second case, had been Postmaster-General and also Commissioner of the General Land Office. The Decatur Case turned upon the question whether an act could be enforced as ministerial when the statute directing its performance was ambiguous and involved the payment of money out of the public Treasury. Justices Story and McLean, while holding that Secretary Paulding had correctly interpreted the joint resolution under which Mrs. Decatur claimed a right in the navy pension fund, nevertheless said that the question of interpretation properly came up in a mandamus proceeding, the latter justice saying (14 Pet., 517):

> I differ from a majority of the judges, who hold that the construction of this resolution, giving to the relatrix a pension, is a duty in the discharge of which an executive discretion may be exercised. The law is directory and imperative, and admits of no discretion on the part of the Secretary.

Mr. Justice Baldwin was of the same opinion upon this point, and stated it very clearly (p. 606):

> If the right of the relator was in all other respects clear, except so far as they depended on the con-

> struction of the acts of Congress, the case was
> judicial cognizance only. The duty of a Secreta
> is not judicial; it is not his province to constr
> laws.

Mr. Justice Catron put his concurrence mainly on t
ground that the writ sought would force money out
the public Treasury, saying that the act directed in t
Kendall case "was no more an official act than t
making of an entry by a clerk by order of a court
justice," and adding: "Had it not been placed on th
narrow ground, the decision could not have been mad
(p. 521).

Chief Justice Taney's opinion was concurred in
five members of the court. He expressly refused
consider the true construction of the joint resolutio
saying (p. 517):

> As we have no jurisdiction over the acts of t
> Secretary in this respect, we forbear to expre
> any opinion upon the construction of the resoluti
> in question.

As one of the grounds for holding that the Secretar
in considering Mrs. Decatur's pension, was not acti
ministerially, he named the fact that it involved t
construction of ambiguous provisions, saying (p. 51

> He must have exercised his judgment upon th
> construction of the law and the resolution, an
> have made up his mind whether she was entitle
> under one only or both, and if he determined th
> she was entitled under the resolution as well
> the law, he must then have again exercised h
> judgment in deciding whether the half pay allowe
> her was to be calculated by the pay proper or th
> pay and emoluments of an officer of the comm
> dore's rank.

He also laid down the rule that presumptively the duties of Cabinet officers are executive, and not merely ministerial (p. 515):

> The duty required by the resolution was to be performed by him as the head of one of the Executive Departments of the Government in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an Executive Department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discrestion. He must exercise his judgment in expounding the law and resolutions of Congress under which he is from time to time required to act. * * * If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department, and if they supposed his decision to be wrong they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them.

It has been long settled in mandamus proceedings against executive officers that an act involving the construction of an ambiguous law is not ministerial but executive in nature, and therefore will not be controlled by the courts. (*Brashear* v. *Mason*, 6 How., 92, 102; *Reeside* v. *Walker*, 11 How., 272, 289; *United States* v. *Guthrie*, 17 How., 284, 304; *Carrick* v. *Lamar*, 116 U. S., 423, 426; *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40; *United States* v. *Lynch*, 137 U. S., 280, 286;

Seymour v. *South Carolina*, 2 D. C. App., 240.) Thus it has been said that an act, although otherwise purely ministerial, will not be directed in a case of doubtful right (*Redfield* v. *Windom*, 137 U. S., 636, 644), and that the duty must be "clear and indisputable." (*International Contracting Co.* v. *Lamont*, 155 U. S. 303, 306.) That the same principles apply to the correlative remedy of injunction we have already shown by the Gaines and Litchfield cases, *supra*.

In *Seymour* v. *North Carolina*, *supra*, the court of appeals of the District of Columbia reviewed all of the decisions of this court in mandamus cases up to that time, and pointed out that since the Kendall case only two writs have been approved—one in *United States* v. *Schurz* (102 U. S., 378), where title to land having already indisputably passed out of the United States by execution of letters patent, the Secretary of the Interior was directed to perform the purely ministerial act of delivering the document; and second, in *Butterworth* v. *Hoe*, *supra*, where the Commissioner of Patents prepared his return for the purpose of excluding all discretionary elements from the case, and made it turn upon the question whether his decision was in any event reviewable by the Secretary of the Interior (112 U. S., at p. 53).

Many injunctions and writs of mandamus have been granted against State officials; but they are not in point, since the rule of *Decatur* v. *Paulding* is based on respect for a coordinate branch of the Government, while all branches are supreme over State officials within the Federal sphere of action. Writs of mandamus against court officers rest upon a principle of

their own, being merely incidental to the proper conduct of judicial business and ancillary to other litigation.

Up to the year 1893 we are unable to find the affirmance of a single injunction against a Federal officer upon the records of this court, except, under special statutory provisions to that end (now Rev. Stat., par. 3636), in *United States* v. *Nourse*, 9 Pet., 7. Other applications had failed for various reasons. (*Litchfield's Case, supra; Snyder* v. *Marks*, 109 U. S., 189.)

In 1893 came the case of *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165), upon which complainant relies. It is somewhat noteworthy that counsel in charge of the appellant's interests made no contest as to the right to enjoin. Either because the Department desired a definite ruling from this court upon the other questions, or for other reason, he simply argued the case upon the merits precisely as it had presented itself to the Secretary.

It is submitted that the Noble Case, if it were clearly in point, is not to be given as much weight as if this question had been raised by counsel, and that it is not to be regarded as a conclusive authority upon suits to remove a cloud upon title. (See *Chase* v. *United States*, 155 U. S., 489, especially pp. 494, 495.)

Upon the present point, however, the Noble Case is not against the position here taken. Nothing in the opinion indicates an intent to overrule the distinction between executive and ministerial acts. This distinction is set forth in the opinion, Mr. Justice Brown saying (p. 171):

> That with respect to the former there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem

> to have been; but with respect to ministerial duties, an act or refusal to act is or may become the subject of review by the courts. * * * Indeed, the reports of this court abound with authorities to the same effect (citing cases). In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

The statute upon which the case turned contained no ambiguity. The question there was whether the approval of a profile by the Secretary of the Interior was sufficient to pass title, or whether a patent was necessary. The act in question (March 3, 1875, c. 152, par. 4) made no reference to any patent, but provided that the company should "file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." All the judges before whom the question was brought were unanimous in their opinion upon it.

In the present case the statute expressly requires a patent; and four learned and careful judges, who have heard full argument upon the question, have already declared the approval of the swamp-land list insufficient to transfer title, and that the question is one still pending in the Interior Department. Assuming that there may be great force in the appellant's contention, nevertheless the opinions of these four judges would seem sufficient by themselves to prove the statute sufficiently ambiguous to defeat any claim that the Secretary's duty after such approval was ministerial only, or that

the revocation and cancellation of the list was in violation of an unambiguous law. (*Lochren* v. *Long*, 6 D. C. App., 486, 505.)

Respectfully submitted.

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